No. 90-1569

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1990

FLEMING LANDFILL, INC. AND JOHN T. FLEMING,

Defendants-Appellants,
Petitioners,

v.

JULIAN GARNES AND SHARON GARNES,

Plaintiffs-Appellees,
Respondents.

ON CERTIORARI TO THE
SUPREME COURT OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether West Virginia law, which authorizes punitive damages to be awarded in tort actions in which "reckless conduct or criminal indifference to civil obligations affecting the rights of others appear," violates the Due Process Clause of the Fourteenth Amendment in that, among other things:

a. it fails to provide adequate notice of the conduct for which punitive damages may be allowed;

b. it fails to set forth any clear, constitutionally acceptable standards for juries to apply in determining whether to award punitive

damages; and

c. by leaving the determination of the amount of punitive damages solely to the jury, West Virginia law fails to set forth any clear, constitutionally acceptable standards for juries to apply in determining the amount of such damages.

DESIGNATION OF PARTIES

Petitioners are Fleming Landfill, Inc. and John T. Fleming (collectively referred to as "Petitioners"). Respondents, Julian Garnes and Sharon Garnes (collectively referred to as "Garnes"), are residents of Kanawha County, West Virginia, residing near the solid waste disposal facility operated by the Petitioners.

Pursuant to Rule 29.1 of the Rules of this Court, Petitioner Fleming Landfill, Inc. states that it is a West Virginia corporation. It has no parent company, non-wholly owned subsidiary or affiliate.

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The opinions of the Circuit Court of Kanawha County, West Virginia are unreported and are reproduced in the Appendix, infra, beginning at App. 1, 4.

The opinion of the Supreme Court of Appeals of West Virginia denying Fleming's petition for appeal is unreported, but is reproduced in the Appendix, infra, at App. 13-14.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

The judgment of the Circuit Court of Kanawha County, West Virginia, was entered on December 9, 1988, awarding Garnes punitive damages of $105,000.00.

[App., infra, 1-3]. On February 2, 1989, the Circuit Court of Kanawha County, West Virginia, entered a final order denying Fleming's motion for judgment notwithstanding the verdict, motion for a new trial, and motion for remittitur. [App. infra, 4-6].

On January 10, 1991, the Supreme Court of Appeals of West Virginia dismissed the Garnes appeal. [App. infra, 15-17]. On January 10, 1991, the Supreme Court of Appeals of West Virginia denied Fleming's petition for appeal, thus, refusing to review the decision of the Circuit Court of Kanawha County, West Virginia. [App. infra, 13-14]. This petition for writ of certiorari is filed within ninety days of the denial of Petitioners'

petition for appeal by the Supreme Court of Appeals of West Virginia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment of the United States Constitution provides in relevant part:

> ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 24, 1987, Garnes filed an action against Fleming alleging that Fleming's operation of a solid waste disposal facility constituted a

nuisance. A jury trial was held and, on November 15, 1988, the jury found that the solid waste facility operated by Fleming constituted a nuisance. The jury also found that Garnes was not entitled to any compensatory damages. The jury awarded punitive damages in the amount of $105,000.00. On February 2, 1990, the Circuit Court of Kanawha County, West Virginia, denied Fleming's motion for judgment notwithstanding the verdict, motion for a new trial, and motion for remittitur.

Garnes filed a petition for appeal with the Supreme Court of Appeals of West Virginia on March 9, 1990. That petition assigned as error the failure to award compensatory damages and the failure of the Circuit Court to issue

a permanent injunction. That appeal was granted on April 4, 1990. On December 20, 1990, Garnes moved to dismiss their appeal. On January 10, 1991, the Supreme Court of Appeals of West Virginia dismissed the Garnes' appeal. On January 7, 1991, Fleming filed a petition for appeal with the Supreme Court of Appeals of West Virginia. This petition for appeal was denied on January 10, 1991.

STATEMENT OF FACTS

Fleming Landfill, Inc. is a West Virginia corporation which operates a solid waste disposal facility in Kanawha County, West Virginia. This landfill has three full-time employees. This landfill is located on property

owned by John T. Fleming and Sandra Fleming. Mr. Fleming's house is the closest residence to the landfill. The landfill began receiving solid waste on July 4, 1979, pursuant to the permit granted by the West Virginia State Department of Health. Garnes claims that the landfill is a nuisance for a number of miscellaneous reasons. Except for Marilyn Cameron, a close friend of Mr. and Mrs. Garnes, no other resident in the area noticed or testified to any problems caused by the landfill. Mr. and Mrs. Garnes' home is approximately 1400 feet from the landfill.

Following the trial court's instructions on the issue of liability,

the jury was instructed on punitive damages as follows:

> The Court instructs the jury that if you find from the evidence the defendants, or either of them, have committed wanton, willful or reckless conduct, affecting the rights of others, including the plaintiffs, and such conduct has directly and proximately caused injury to the plaintiffs, the jury may assess punitive damages against the defendants.
>
> The Court instructs the jury that punitive damages are damages which will punish the defendants and in the judgment of the jury should be sufficient to deter defendant John Fleming and/or the defendant Fleming Landfill, Inc. and others from engaging in a like course of conduct.
>
> The Court instructs the jury that in assessing punitive damages you should take into consideration all the circumstance surrounding the particular occurrence which is the subject of this litigation, including the nature of the wrongdoing, the extent

> of harm inflicted, the intent of the party committing the act, the economic wealth of the defendants, including in each case his or its assets and income as well as any mitigating circumstances.

This instruction was objected to by Fleming because it did not require that an award of punitive damages bear a reasonable relationship to any compensatory damage award. [App. infra 47-48]. The trial judge apparently believed that this reasonable relationship requirement was contained in another instruction. [App. infra 2]. However, the reasonable relationship requirement was not contained in any instructions given to the jury.

On November 15, 1988, the jury found that Garnes was not entitled to any compensatory damages. The jury

further awarded punitive damages in the amount of $105,000.00.

PRESENTATION OF ISSUES IN STATE COURT

Fleming timely filed a motion for judgment notwithstanding the verdict, motion for a new trial, and motion for remittitur. At that time, the federal questions presented herein were raised. [App. infra, 28-33]. The trial court summarily denied Petitioners' motions without addressing the constitutional issues. [App. infra, 4-12]. The federal questions presented herein were also raised in Fleming's petition for appeal. [App. infra, 18-27].

REASONS FOR GRANTING THIS PETITION

The issues presented herein were recently addressed in Pacific Mutual Life Ins. Co. v. Haslip, 59 USLW 4157 (March 4, 1991). Subsequently, this Court granted writ of certiorari in a number of cases involving punitive damages. In those cases the judgments were vacated and the cases remanded for further consideration in light of Pacific Mutual Life Ins. Co. v. Haslip, supra.

In this case, the jury found that Garnes was not injured by the conduct of Fleming. The jury made no award of compensatory damages. The jury was instructed that it could award punitive damages if Fleming's conduct was wan-

ton, willful, or reckless, and directly and proximately caused injury to the plaintiffs. Another jury instruction violated the Due Process Clause because it did not require that an award of punitive damages bear a reasonable relationship to any compensatory damage award.

Under West Virginia law, a jury is authorized to award punitive damages in any tort case in which wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear. Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982). This standard is vague, indefinite and provides very little guidance as to the conduct prohibited. In this case, the jury was instructed

that they may assess punitive damages if they found the Petitioners to have committed reckless conduct. "Reckless conduct" was not defined to the jury. Moreover, there was no limit as to the amount of damages that could be awarded by the jury. Moreover, although objected to by the Petitioners, the jury was not instructed that an award of punitive damages must bear a reasonable relationship to any compensatory damage award. Moreover, the Petitioners have not been afforded the appellate review granted the defendant in Haslip.

This case is typical of the explosion of punitive damage claims and awards which are escalating in both number and size. As shown by the award against Fleming in this case, juries,

and reviewing trial and appellate courts, have free and untrammelled discretion regarding whether and how much to punish. In this case, Petitioners were punished when their conduct did not cause any damage.

Justice Elkington in Rosener v. Sears, Roebuck & Co., 110 Cal.App.3d 740 (1980), app. dism'd, 450 U.S. 1051 (1981) stated this matter succinctly, at page 759:

> Placing unrestricted power in a jury to direct punishment for "evil intent" by compelling the "evildoer" to pay money to another without right thereto, seems foreign to any concept of due process known to me.

Judicial oversight at present does no more than shift discretion to the judge or panel of judges. All of the

"tests" for the validity of these awards boil down to the subjective determination of whether the particular court feels the award was excessive, based upon, as with jurors, their undivided backgrounds, temperament and societal concerns. In this case, not only was an objective test not used, the appellate court refused to subjectively review the punitive damage award.

This is an appropriate case for this Court to examine the present state of punitive damages law in West Virginia to determine whether Due Process standards are met, considering the free reign given to juries by that doctrine to punish selectively, to indulge bias, prejudice and any wealth redistribution

inclinations they may have, and to exercise standardless discretion to render awards bearing no necessary relationship to actual harm caused.

I

WEST VIRGINIA PUNITIVE DAMAGES LAW DENIES PETITIONERS DUE PROCESS OF LAW.

Damages and penalties imposed by state laws, including civil laws, may be invalid as deprivations of property without due process of law. Missouri Pac. Ry. Co. v. Tucker, 230 U.S. 340, 351 (1913); Southern Western Tel & Tel Co. v. Danaher, 238 U.S. 482, 491 (1915). In Pacific Mutual Life Ins. Co. v. Haslip, 59 USLW 4157 (March 4, 1991), Justice Blackmun, in discussing

the constitutionality of punitive damages under the Due Process Clause of the Fourteenth Amendment stated:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when a case is tried to a jury properly enter into the constitutional calculus.

Punitive damage law in West Virginia, as applied in this case, violates the Due Process Clause in each of the following specific ways, among others:

a. It fails, as do the court decisions interpreting it, to notify people (who are later to become defendants) of the nature of the offenses for which they may be liable in punitive damages, and it fails to limit the award of

punitive damages to criminal, or even intentional, behavior;

b. It likewise fails, as do the court decisions interpreting it, to guide judges and juries with regard to the nature of offenses for which punitive damages may be awarded;

c. It fails, as do the court decisions interpreting it, to inform judges and juries as to the means of calculating or determining the amount of punitive damages to be awarded, whether by reference to actual damages or otherwise, leaving such determination to the jury;

d. It fails to place any ascertainable or meaningful limit upon the amount of punitive damages to be awarded; and

e. It permits awards of excessive punitive damages without relationship to the public safety, health, or welfare sought to be served by the allowance of punitive damages.

Considered separately and cumulative, the foregoing failures demonstrate that West Virginia law as applied in this case is a denial of due process. As stated by Justice Kennedy in his concurring opinion in Pacific Mutual Life Ins. Co. v. Haslip:

> This is not to say that every award of punitive damages by a jury will satisfy constitutional norms. A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case.

In the present case, the jury found that Garnes were not damaged by the conduct of Petitioners. The jury awarded no compensatory damages. The

punitive damage award is excessive under due process standards.

In Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. _____, 109 S.Ct. 2909 (1989), Justice Brennan, in his concurrence, suggested that Due Process forbids excessive damages in civil cases, stating, at page 2925:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive," Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909), or "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable," St. Louis, I.M. & S.R. Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482, 491 (1915); Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 522-

> 23 (1885). I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.

West Virginia law as applied in the present case is more constitutionally egregious than that found in Pacific Mutual Life Ins. Co. v. Haslip, supra. In Haslip, the plaintiff recovered a $200,000 compensatory damage award. 59 USLW at 4158, n.2. In the present case there was no compensatory damage award justifying the punitive damage award.

Moreover, in Haslip, the alleged constitutional deficiencies were fully addressed by the Supreme Court of Alabama. In the present case, the

Supreme Court of Appeals of West Virginia refused to review the jury verdict. [App. infra 13-14].

CONCLUSION

Petitioners' constitutional claims are substantial. They have been punished in an amount vastly out of proportion to the compensatory damages. The jury failed to make any award of compensatory damages. The award was not reviewed by any appellate court. Because these challenges raise important issues, this Petition for Writ of Certiorari should be granted and this case should be briefed and set for oral argument.

April 8, 1991.

Respectfully submitted,
FLEMING LANDFILL, INC. and
JOHN T. FLEMING

By _____
Counsel of Record

APPENDIX

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JULIAN GARNES and
SHARON GARNES,
Plaintiffs,

vs. CIVIL ACTION NO. 87-C-4527

FLEMING LANDFILL, INC.,
and JOHN T. FLEMING,
Defendants.

JUDGMENT

This action came on for trial before the Court and a properly impaneled jury, Honorable Herman Canady presiding, and the issues having been duly tried and the jury on November 15, 1988, having rendered the following verdict:

1. We, the jury, find that the operation of the solid waste facility by the defendants since December 24, 1985, does constitute a nuisance.

2. We, the jury, find that the plaintiffs are not entitled to any compensatory damages.

3. We, the jury, find that the plaintiffs are entitled to punitive damages and we do further award the plaintiffs punitive damages in the amount of $105,000.

It is hereby ORDERED and ADJUDGED that the plaintiffs recover of the defendants John T. Fleming and Fleming Landfill, Inc. the sum of $105,000, with interest thereon at the rate of ten percent from the aforesaid date until paid and their costs of action.

The Court notes the exceptions of both plaintiffs and defendants to the entry of this judgment.

Dated this 9th day of December, 1988.

/s/ Herman Canady, Jr.
Circuit Judge

Order Book: CA
Book 88-18, P. 348-C

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JULIAN GARNES and
SHARON GARNES,
Plaintiffs,

vs. CIVIL ACTION NO. 87-C-4527

FLEMING LANDFILL, INC.
and JOHN T. FLEMING,
Defendants.

ORDER

This matter having come on for hearing before the Court and a properly empaneled jury and the jury having considered the evidence and rendered a verdict and a judgment having previously been entered on that verdict, and the Court having considered the record and the evidence presented and the motions made by the parties to this action, and being sufficiently advised, it is hereby ORDERED as follows:

1. The defendants' motion for judgment notwithstanding the verdict, the defendants' motion for a new trial, and the defendants' motion for remittitur are denied. The Court notes the objection of the defendants to this ruling.

2. The plaintiffs' motion for judgment notwithstanding the verdict is denied. The Court notes the plaintiffs' objection to this ruling.

3. The plaintiffs' motion for permanent injunction is denied except that it is granted in the following extent: the defendant is hereby enjoined and restrained from allowing mud and debris to accumulate and remain on the public right of way providing ingress and egress from the Fleming

Landfill. The Court notes the objections of both plaintiffs and defendants to this ruling.

4. The Court has set forth the basis for the rulings set forth in this Order in a letter dated January 8, 1990, and addressed to all counsel of record. A copy of that letter is attached to this Order and is made a part hereof.

To all of which the defendants hereby object and except.

ENTERED this 2nd day of February, 1990.

/s/ Herman Canady, Jr.
Judge

Order Book: CA
Book 90-3, P. 50

State of West Virginia
Thirteenth Judicial Circuit
4th Floor
Kanawha County Judicial Building
Charleston, West Virginia 25301

Herman G. Canady, Jr.
Judge

January 8, 1990

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Re: Julian Garnes and Sharon Garnes v. Fleming Landfill, Inc. and John T. Fleming
87-C-4527

Gentlemen:

A number of post trial motions were made by both parties during the months that followed the jury trial herein.

Defendant's motion to set aside the verdict of the jury is primarily based upon the contention that since the jury verdict awarded no compensatory damages to the plaintiff, this Court cannot accept the verdict awarding punitive damages. Indeed, it is defendant's position that an award of compensatory damages is prerequisite to an award of punitive damages. At the very least defendants maintain that there must be compensatory damages that stand in substantial relation to any punitive damages. It has been widely held that there is no cause of action for punitive damages alone. 22 Am Jur 2d, Damages 241, 17 ALR2d 527. The bulk of these rulings simply imply that a jury must consider the cause of action independently of plaintiff's claim for exemplary damages. Some states have ruled that a jury must first award compensatory damages before any punitive damages. West Virginia was long regarded as such a jurisdiction. Toler v. Cossinelli, 129 WV 591, 41 S.E.2d 672 (1942). Recent West Virginia cases reflect a trend away from strict adherence to the "reasonable relation" rule. Wells v. Smith, W.V. 297 S.E.2d 872 (1982), Leach v. Biscayne Oil and Gas Co., W.V. 289 S.E.2d 197 (1982).

> "... where the jury is properly instructed on the issue of damages, the failure to return an award for compen-

satory damages should not of itself preclude a punitive award, provided that there is evidence showing an injury to the plaintiff caused by the egregious and tortious conduct of the defendant." Wells v. Smith (Supra)

"Only where the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury should the award be set aside as excessive." Wells v. Smith (Supra)

This Court finds that there was ample evidence presented of defendant's failure to comply with State regulatory provisions, either willfully or through wreckless indifference. These regulations were intended to prevent harm such as was alleged in the plaintiff's complaint. Here the jury was properly instructed as to what they could properly consider, including the circumstances surrounding particular occurrences; the nature of the alleged committing party; as well as the wealth of the alleged committing party. The jury was also properly instructed that annoyance and inconvenience was to be considered in regards to compensatory damages, if any. There being some admissible evidence covering these points, the jury having been properly

instructed on these matters, the verdict will not be set aside on grounds that no compensatory award was made.

The second major point raised by defendants in support of post trial motions is that the jury award is excessive. Previous pronouncements of the West Virginia Supreme Court of Appeals relied heavily upon the "reasonable relation" rule. The thinking being that where punitive damage awards remain in proportion to "actual damages done" the possibility that an award might be based on partiality and prejudice is minimized. However, recent rulings of our Supreme Court reflect a trend away from strict adherence of such a rule on the grounds that it would "thwart the punishment purpose of punitive damages in cases where the defendant's conduct has been egregious, but where plaintiff has suffered intermediate or nominal damages. This discourages the plaintiff from bringing the suit and deprives the public from the deterrence of wanton acts." Wells v. Smith (Supra). The jury considered some evidence of defendant's financial ability.

> "Courts must not set aside jury verdicts as excessive, unless they are monstrous, enormous, beyond all measure, unreasonable, outrageous and manifestly show jury passion, impartiality, prejudice or

corruption." Muzelak v. King Chevrolet Inc., 368 S.E.2d 710 (W.V. 1988); Roberts v. Stevens Clinic Hospital, 345 S.E.2d 791 (1986).

The post trial motions to set aside upon this ground is DENIED.

The final matter brought before the Court that requires ruling is the motion of plaintiff for a permanent injunction against the defendant, closing defendant's business, upon grounds that defendant is maintaining a nuisance, and upon all grounds for which plaintiff prayed for damages. The Court notes that damages were sought and an award was secured herein. This Court is also taking into consideration that a temporary injunction was denied by Judge Patrick Casey herein. For this equitable portion of the case the jury sat as an advisory jury and the lack of any compensatory damages is taken into consideration. There was no evidence that the defendant's landfill was situated within a populous municipality; but, to the contrary the evidence is that it was construed in a rural area, without zoning laws. It is the finding of this Court that the statutory laws and regulations do not render the landfill herein to be illegal, nor does any law of this State define it to be a nuisance per se. Furthermore, the verdict of the advisory jury leads this

Court to conclude and find that the landfill is not a situation that will likely be a nuisance in the future, if left without Court intervention and not shut down. The motion for permanent injunction is therefore denied for the greater part, except the defendant is enjoined from allowing mud and debris to accumulate and remain upon the public right of way providing ingress and egress from the landfill herein.

The remaining motions "NOV" and the grounds that they serve are hereby Overruled for the reasons previously expressed in the record in this case.

An order in conformity herewith, will be prepared by this Court incorporating this letter memorandum of opinion.

Very truly yours,

/s/ Herman G. Canady, Jr.
Judge

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of January, 1991, the following order was made and entered:

Julian Garnes and
Sharon Garnes,
Plaintiffs Below, Appellees

vs.) No. 910088

Fleming Landfill, Inc. and
John T. Fleming,
Defendants Below, Appellants

Upon an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 2nd day of February, 1990.

On a former day, to-wit, January 7, 1991, came the petitioners, Fleming Landfill, Inc. and John T. Fleming, by Pauley, Curry, Sturgeon & Vanderford, Arden J. Curry, Arden J. Curry, II, and David K. Schwirian, their attorneys,

and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 2nd day of February, 1990. Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition on the merits.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of January, 1991, the following order was made and entered:

Julian Garnes and
Sharon Garnes,
Plaintiffs Below, Appellants

vs.) No. 19612

Fleming Landfill, Inc. and
John T. Fleming,
Defendants Below, Appellees

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 2nd day of February, 1990.

On a former day, to-wit, December 21, 1990, came the appellants, Julian Garnes and Sharon Garnes, by John McFerrin and Benjamin Snyder, their attorneys, and presented to the Court their motion in writing to dismiss this

action, for the reasons stated therein. Thereafter, on the 7th day of January, 1991, came the appellees, Fleming Landfill, Inc., and John T. Fleming, by Pauley, Curry, Sturgeon & Vanderford, Arden J. Curry, Arden J. Curry, II, and David K. Schwirian, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby sustain said motion. It is therefore considered and ordered by the Court that this action be, and the same is hereby dismissed from the docket of this Court, each party to pay its own costs; all of which is ordered to be

certified to the Circuit Court of Kanawha County.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of Appeals

WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. 19162

JULIAN GARNES and
SHARON GARNES,
Plaintiffs/Appellants,

vs. Filed Jan 7 1991
Ancil G. Ramey, Clerk of
the Supreme Court of Appeals
of West Virginia

FLEMING LANDFILL, INC., and
JOHN T. FLEMING,

Defendants/Appellees.

PETITION OF APPELLEES FOR CROSS-ASSIGNMENT OF ERROR OR, IN THE ALTERNATIVE PETITION FOR APPEAL

Petitioners, Fleming Landfill, Inc. and John T. Fleming, are aggrieved by an Order of the Circuit Court of Kanawha County, West Virginia, entered on the 9th day of December, 1988, awarding the plaintiffs, Julian Garnes and Sharon Garnes, punitive damages of

$105,000.00 plus interest, and from a Final Order entered by the Circuit Court of Kanawha County, West Virginia, on February 2, 1990, denying petitioners' motion for judgment notwithstanding the verdict, the petitioners' motion for a new trial, and the petitioners' motion for remittitur.

***

THE JUDGMENT BASED ON THE JURY'S PUNITIVE DAMAGE AWARD VIOLATES DUE PROCESS AND THE EIGHTH AMENDMENT'S PROHIBITION AGAINST EXCESSIVE FINES

Although punitive damages are awarded in civil actions, they are functionally penal, in that they promote the traditional goals of punishment -- retribution and deterrence:

> Punitive damages are not compensation for injury. Instead, they are private fines levied

> by civil juries to punish reprehensible conduct and to deter its future occurrence. (Emphasis Added) International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 48 (1979), quoting Gertz v. Robert Welch. Inc., 418 U.S. 323, 350 (1974).

Because the purpose and impact of punitive damages are fundamentally penal in nature, due process requires that enhanced procedural safeguards be extended to defendants in punitive damage actions.[1] No such safeguards were present in this case.

---

[1] The United States Supreme Court has ruled that "punishment cannot be imposed 'without due process of law.'" Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963). Due process requires that legal procedures be consistent with fundamental fairness. Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25 (1981).

In Bankers Life & Casualty Co. v. Crenshaw, 108 S.Ct. 1645 (1988), the U.S. Supreme Court recently faced a similar due process challenge to a large punitive damage award. In Bankers Life, a Mississippi jury awarded $1.6 million in punitive damages and $20,000.00 in actual damages (a ratio of 80 to 1 as compared with the infinite ratio in this case) for the defendant's bad faith refusal to pay an insurance claim. Although the Supreme Court did not decide the due process issue, as it was not squarely raised below in the Mississippi Supreme Court, Justice O'Connor noted in a concurring opinion, joined by Justice Scalia, that the defendant "ha[d] touched on a due process issue that ...

is worthy of the Court's attention in an appropriate case." Id. at 1655.

Under Mississippi law, as in West Virginia, juries are given broad discretion to award any amount of punitive damages in tort cases where the defendant acts with a certain mental state. According to Justice O'Connor, "because of the punitive character of such awards, there is reason to think that this [broad discretion] may violate the due process clause." Id. Justice O'Connor also emphasized that granting juries wholly standardless discretion to determine the severity of punishment "appears inconsistent with due process." Id. at 1656.

Justice O'Connor recognized that because punitive damages are "not

measured against actual injury, ... there is no objective standard that limits their amount. Hence, the impact of these windfall recoveries is unpredictable and potentially substantial... For these reasons ... the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits." Id. at 1655. Justice O'Connor compared punitive damages to criminal penalties where the Supreme Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." Id. at 1656, quoting United States v. Batchelder, 442 U.S. 114, 123 (1979). Based on this anal-

ogy, it was evidence that "[n]othing in Mississippi law warned [Bankers Life] that by committing a tort that caused $20,000.00 of actual damages, it could expect to incur a $1.6 million punitive damage award." Bankers Life, 108 S.Ct. at 1656.

In Browning-Ferris v. Kelco, 109 S.Ct. 2909 (1989), the United States Supreme Court held that the Eighth Amendment's excessive fines clause does not apply to civil lawsuits. Again, it did not reach the due process issues. Nonetheless, four of the Justices, while concurring in the decision, expressed concern about punitive damage procedures. Justice Brennan, joined by Justice Marshall, stated:

> Without statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts." App. 81. Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. 109 S.Ct. at 2923.

Much of the same uneasiness was expressed by Justice O'Connor, joined

by Justice Stevens, in her concurrence in Browning-Ferris:

> I share Justice Brennan's view ... that nothing in the court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in Banker's Life ... regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.

Defendants in this case were similarly penalized by a jury that was given almost unlimited discretion and that was guided solely by vague and deficient standards for assessing punitive damages. In the absence of adequate standards and procedural safeguards, the jury awarded $105,000.00 to plaintiffs as a total windfall, completely out of proportion

to the defendants' conduct or the actual harm suffered by the plaintiffs. Indeed, nothing in West Virginia law warned defendants that by committing a tort that causes zero dollars in actual damages they could expect to incur $105,000.00 in punitive damages. Bankers Life, 108 S.Ct. at 1656. The jury's verdict in this case fails to satisfy due process.

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JULIAN GARNES and
SHARON GARNES,
Plaintiffs,

vs. CIVIL ACTION NO. 87-C-4527

FLEMING LANDFILL, INC.,
and JOHN T. FLEMING,
Defendants.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR A NEW TRIAL

The defendants, Fleming Landfill, Inc. and John T. Fleming, hereby respectfully move the Court, pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure, that the verdict rendered herein be set aside and that judgment be entered in favor of the defendants in accordance with their motion for a directed verdict.

Alternatively, the defendants move, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, that a new trial be granted the defendants. These motions should be granted for the following reasons:

1. The fact that the jury awarded no compensatory damages means that the jury expressly found that the plaintiffs were not damaged by the defendants' solid waste facility and, in the absence of any damage, there cannot be a nuisance on which to base an award of punitive damages.

2. The jury's award of punitive damages is inconsistent with the jury instructions tendered by the plaintiffs and given by the Court.

3. The Court erred in refusing to direct a verdict for the defendants at the close of the plaintiffs' and defendants' case in that there was insufficient evidence as a matter of law to sustain a verdict for punitive damages.

4. The Court erred in giving plaintiffs' instruction as to punitive damages, which instruction omitted the requirement that punitive damages must bear a reasonable relationship to any compensatory damage award.

5. The punitive damage award is clearly excessive and unsupported by the evidence.

6. The Court erred in admitting into evidence inspection reports from the Department of Natural Resources,

as such reports are inadmissible and a large number of those reports discuss actions barred by the statute of limitations.

7. The Court erred in admitting into evidence inspection reports from the Department of Natural Resources, as such reports are inadmissible because they are not relevant to the issues raised by the pleadings in this case.

8. Plaintiffs' counsel was improperly allowed to argue to the jury that the defendants' solid waste facility constituted a nuisance per se.

9. The punitive damage award violates due process and the Eighth Amendment's prohibition against excessive fines.

10. The plaintiffs were represented at trial by Benjamin N. Snyder. On November 15, 1988, he was no longer admitted to the Bar of this State and was not authorized to practice law in this State. Trial in this matter was conducted on November 15, 1988, at which time Benjamin N. Snyder made closing arguments to the jury, among other things. The prosecution of any action by a layman is a nullity and any judgment rendered therein is void.

11. The Court erred in allowing plaintiffs' counsel, in closing statement, to argue that the landfill operated at a profit and using as a basis the amount of projected or estimated revenue for a period of seven months to attempt to establish the

wealth of the defendants to be considered in awarding punitive damages.

12. The Court erred in admitting into evidence pictures of trucks hauling garbage, in that said pictures were not admissible, not relevant, were unduly prejudicial, and not representative.

13. The jury verdict is contrary to the law and the evidence of the case.

FLEMING LANDFILL, INC.
AND JOHN T. FLEMING
By Counsel

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JULIAN GARNES and
SHARON GARNES,
Plaintiffs,

vs. CIVIL ACTION NO. 87-C-4527

FLEMING LANDFILL, INC.,
and JOHN T. FLEMING,
Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR A NEW TRIAL

***

THE JUDGMENT BASED ON THE JURY'S PUNITIVE DAMAGE AWARD VIOLATES DUE PROCESS AND THE EIGHTH AMENDMENT'S PROHIBITION AGAINST EXCESSIVE FINES

Although punitive damages are awarded in civil actions, they are functionally penal, in that they promote the traditional goals of punishment - retribution and deterrence:

> Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. International Brotherhood of Electrical Workers v. Foust, 422 U.S. 42, 48 (1979), quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (Emphasis Added)

Because the purpose and impact of punitive damages are fundamentally penal in nature, due process requires that enhanced procedural safeguards be extended to defendants in punitive damage actions.[1] No such safeguards were present in this case.

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[1] The United States Supreme Court has ruled that "punishment cannot be imposed 'without due process of law.'" Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963). Due process requires that legal procedures be consistent with the fundamental fairness. Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25 (1981).

In Bankers Life & Casualty Co. v. Crenshaw, 108 S.Ct. 1645 (1988), the U.S. Supreme Court recently faced a similar due process challenge to a large punitive damage award. In Bankers Life, a Mississippi jury awarded $1.6 million in punitive damages and $20,000.00 in actual damages (a ratio of 80 to 1 as compared with the infinite ratio in this case) for the defendant's bad faith refusal to pay an insurance claim. Although the Supreme Court did not decide the due process issue, as it was not squarely raised below in the Mississippi Supreme Court, Justice O'Connor noted in a concurring opinion, joined by Justice Scalia, that the defendant "ha[d] touched on a due process issue that ...

is worth of the Court's attention in an appropriate case." Id. at 1655.

Under Mississippi law, as in West Virginia, juries are given broad discretion to award any amount of punitive damages in tort cases where the defendant acts with a certain mental state. According to Justice O'Connor, "because of the punitive character of such awards, there is reason to think that this [broad discretion] may violate the Due Process Clause." Id. Justice O'Connor also emphasized that granting juries wholly standardless discretion to determine the severity of punishment "appears inconsistent with due process." Id. at 1656.

Justice O'Connor recognized that because punitive damages are "not

measured against actual injury, ... there is no objective standard that limits their amount. Hence, the impact of these windfall recoveries is unpredictable and potentially substantial ... For these reasons ... the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits. Id. at 1655 (Emphasis Added). Justice O'Connor compared punitive damages to criminal penalties where the Supreme Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." Id. at 1656, quoting United States v. Batchelder, 442

U.S. 114, 123 (1979). Based on this analogy, it was evidence that "[n]othing in Mississippi law warned [Bankers Life] that by committing a tort that caused $20,000.00 of actual damages, it could expect to incur a $1.6 million punitive damage award." Bankers Life, 108 S.Ct. at 1656.

Defendants in this case were similarly penalized by a jury that was given almost unlimited discretion and that was guided solely by vague and deficient standards for assessing punitive damages. In the absence of adequate standards and procedural safeguards, the jury awarded $105,000.00 to plaintiffs as a total windfall, completely out of proportion to the defendants' conduct or the actual harm suffered by

the plaintiffs. Indeed, nothing in West Virginia law warned defendants that by committing a tort that causes zero dollars in actual damages they could expect to incur $105,000.00 in punitive damages. Bankers Life, 108 S.Ct. at 1656. The jury's verdict in this case fails to satisfy due process.

Moreover, the jury's grossly excessive punitive damage award violates the Eighth Amendment's prohibition against excessive fines. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The principle that fines shall not be excessive has its roots in the Magna Carta and the English Bill of Rights of 1689. Solem

v. Helm, 463 U.S. 277, 284-85 (1983). Under the Eighth Amendment, punishment must be proportionate to the wrong committed. This principle is deeply rooted in our jurisprudence, and was recognized by the United States Supreme Court as early as 1910. Weems v. United States, 217 U.S. 349, 367 (1910). Although the United States Supreme Court has not yet ruled on the constitutionality of massive punitive damage awards under the Eighth Amendment, the Court has recognized that the imposition of such awards "raise[s] important issues which, in an appropriate setting, must be resolved." Aetna

Life Ins. Co. v. Lavoie, 475 U.S. 813, 828-29 (1986).[1]

In Colonial Pipeline Co. v. Brown, 365 S.E.2d 827 (Ga. 1988), the Georgia Supreme Court recently struck down a punitive damage award as excessive under Georgia's constitutional provision barring excessive fines, which is substantially identical to the Eighth

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[1] An historical analysis of the Eighth Amendment reveals that it should be applied to civil actions in which punitive damages are awarded. The excessive fines clause can be traced to the "excessive amercement" provisions of the Magna Carta. Amercements were additional punishments imposed on defendants in civil and criminal actions in 13th-century England. Bittle, Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness, 75 Cal. L. Rev. 1433, 1441-47 (1987); Jeffries, A Comment on The Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 147-158 (1986).

Amendment. In Colonial Pipeline, the jury awarded approximately $56,000.00 actual damages and $5 million punitive damages in an action to recover for the destruction of plaintiff's bulldozer. The court based its conclusion that Georgia's excessive fine provision applies to punitive damage awards on its determination that the Eighth Amendment's Excessive Fines Clause "was intended as a protection from all excessive monetary penalties," and that the object of punitive damages in Georgia was "among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence." Id. at 831. The court held that the jury's punitive damage award was excessive because "there was no

bodily injury to this plaintiff, ... the award does not bear a rational relationship to the actual damages award, [and] there is no rational relationship between the offense and the punishment in that the punitive damage award was 100 times the property damage award. Id. at 833.[1] Similarly, plaintiffs did not suffer any loss of life, personal injury or even property damage, and there is no rational

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[1] See also: Alabama Power Co. v. Cantrell, 507 So.2d 1295, 1308 (Ala. 1986) (Maddox, J., concurring in part, dissenting in part) (punitive damages of $1 million upheld in wrongful death action; "[m]y review of the history of the Excessive Fines Clause of the Eighth Amendment and its English antecedents convinces me that the Clause may be broad enough to cover punitive damage awards in civil cases.")

relationship between the offense and the punishment.[1]

Indeed, the jury's award exceeds the civil and criminal penalties in West Virginia for many acts that are much more culpable than defendants.[2]

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[1] See: Solem v. Helm, 463 U.S. at 292 (criteria for Eighth Amendment proportionality analysis include the gravity of the offense and the harshness of the penalty).

[2] Violation of West Virginia's Unfair Trade Practices Act subjects the offending corporation to a maximum fine of one thousand dollars. W.Va. Code § 47-11A-11. Similarly, "illegal, fraudulent, and unconscionable conduct" in violation of West Virginia's Consumer Credit Act carries a maximum penalty of one thousand dollars. W.Va. Code § 46A-5-101(1). Corporations that purposely engage in false advertising may be fined up to two thousand dollars in West Virginia. W.Va. Code § 32A-1-2. Corporations that manufacture and sell adulterated food are subject to "fines not exceeding five hundred dollars." W.Va. Code § 16-7-4. Finally, West Virginia's Antitrust Act limits monetary punishment to treble

The jury's arbitrary and excessive punitive damage award violates the Eighth Amendment and should be set aside.

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damages. W.Va. Code §47-18-9.

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JULIAN GARNES and
SHARON GARNES,
Plaintiffs,

vs. CIVIL ACTION NO. 87-C-4527

FLEMING LANDFILL, INC.,
and JOHN T. FLEMING,
Defendants.

PORTIONS OF TRIAL TRANSCRIPT

MR. CURRY: Your Honor, I think to make this instruction correct there ought to be language -- I object to it as written because of the fact that it does not have language of punitive damages. It must bear reasonable relationship to any compensatory damages.

THE COURT: There is an instruction over in there that contains that

language. Maybe it's the defense's instruction. I recall reading it.

MR. CURRY: I don't remember it. Maybe --

MR. SNYDER: This is right out of, I believe the Wells case, Your Honor. It's a headnote right out of a case. There were five criterion that the Supreme Court said the jury was supposed to look at, and that's the history right there.

THE COURT: I'm going to give the one pertaining to Footnote Number 10. I think that that other aspect is on over in the other instruction, and I'll note defendant's objection.

MR. CURRY: All right. Just show our objection to the giving of it.

90-1569

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FLEMING LANDFILL, INC. AND JOHN T. FLEMING,

Defendants-Appellants,
Petitioners,

v.

JULIAN GARNES AND SHARON GARNES,

Plaintiffs-Appellees,
Respondents.

ON CERTIORARI TO THE
SUPREME COURT OF WEST VIRGINIA

RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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II. STATEMENT OF THE CASE

The respondents believe that the statement of the procedural history of this action provided by the petitioners is essentially accurate.

It does, however, give inadequate attention to the review of the jury award of punitive damages. The trial court opinion (Appendix pp. 3-8) reviewed the jury award under long established West Virginia law on punitive damages and determined that the jury was properly instructed in West Virginia law and that the award of punitive damages was proper.

While the West Virginia Supreme Court of Appeals did not write an

opinion, it did refuse the appeal "on the merits." (Appendix pp. 1-2).

The statement of facts provided by the petitioners, while literally true, is misleading because it fails to fully describe the manner in which the Fleming Landfill operated. Although it is literally true that the respondents and one other person were the only residents who testified concerning the operation of the landfill, it is also true that the West Virginia Department of Natural Resources had consistently complained about the manner in which the landfill operated and its failure to comply with West Virginia regulations concerning the operation of a landfill.

In 1978, the respondents began operating a dump across the road from the respondents' home. When the West Virginia Department of Health authorized the operation of the dump, it set out in that authorization the types of waste which the Fleming Landfill could accept; this list did not include medical or hazardous waste.

From the very beginning, the landfill caused problems. Inspectors from the Department of Health repeatedly noted violations of Health Department regulations at the Fleming Landfill.

After repeated warnings over a period of several years, on April 21, 1982, the West Virginia Department of Health ordered the

respondent John Fleming to cease and desist receiving and depositing solid waste at the landfill and to cover all exposed waste immediately. As a basis for this order, the Department of Health cited, among other things, uncovered waste from previous days, an inadequate (or non-existent) leachate[1] collection or treatment system, pollution of a stream, and a host of other problems. (Appendix pp. 9-12). The record contains no evidence that the cease and desist order of April 21, 1982, was ever lifted.

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[1]Leachate is the liquid that results from water flowing through and out of the garbage. Because the water has been in contact with the garbage, it typically contains large concentrations of a variety of pollutants.

In May, 1982, and June, 1982, representatives of the West Virginia Department of Health contacted the respondents to inform them that the landfill was still not in compliance with West Virginia statutes and regulations.

In 1983, the West Virginia Department of Natural Resources assumed responsibility for the regulation of landfills. Soon after they gained this authority, inspectors from the West Virginia Department of Natural Resources inspected the landfill and discovered that landfill operations were being conducted and there were

approximately thirty-five days'[2] worth of uncovered garbage.

1985 and 1986 presented an unbroken string of violations[3] of Department of Natural Resources' regulations. According to the evidence of record, they were as follows:

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[2]Regulations require that the garbage be covered at the end of every day.

[3]From this series of inspections by the Department of Natural Resources, one might infer that the cease and desist order was rescinded and the landfill was allowed to reopen. It should be remembered that the Department of Natural Resources assumed responsibility to regulate landfills from the Department of Health at about the time of the revocation. This transfer may have created some confusion about the status of the Fleming Landfill permit. In any event, the respondents presented no evidence to show that the revoked permit was ever reinstated.

Mar. 21, 1985: Department of Natural Resources inspected and found piles of garbage, polluted water, blackish grey stream.

May 14, 1985: Department of Natural Resources inspected. Found mountain of garbage, flies everywhere.

June 3, 1985: Certified letter from Department of Natural Resources cites lack of cover, feeding and breeding of disease-carrying vermin.

June 11, 1985: Department of Natural Resources inspected and found 20 days worth of garbage. Flies and bad odor present.

June 19, 1985: Inspection by Department of Natural Resources finds "mountains of garbage" uncovered. Flies and odor very bad.

Feb. 4, 1986: Department of Natural Resources inspected and found thirty days of garbage uncovered. Smells present.

Mar. 17, 1986: Letter from Department of Natural Resources citing lack of cover, presence of vermin.

Mar. 27, 1986: Department of Natural Resources inspection finds the same pile that was uncovered at last inspection is still uncovered. 30-60 days of garbage. Department determined that the landfill needs more equipment if they are going to take in this much garbage.

Apr. 24, 1986: Department of Natural Resources inspects and finds foul discharge from ponds, flies, and odors. Three days uncovered garbage present.

May 7, 1986: Department of Natural Resources inspects and finds 3-5 days of garbage uncovered. Discharge to stream. Diversion ditch not installed properly. Water samples taken by the Department of Natural Resources show high bacteria, iron, phenol, iron in water coming from landfill.

July 9, 1986: Department of Natural Resources inspects and finds a large mound of garbage. Large dozer out of service and small one cannot keep up. Creek black below fill.

Aug. 7, 1986: Department of Natural Resources inspects and finds both dozers broken.

> Mound of garbage has tripled. Odor and flies. Stream still black.

After years of noting violations and sending the Fleming Landfill certified letters with no apparent effect, the West Virginia Department of Natural Resources sued the respondents in the Circuit Court of Kanawha County, Civil Action No. 86-C-3918. This was on October 3, 1986.

On October 7, 1986, the Department of Natural Resources inspected the Fleming Landfill. Although the landfill was still not in compliance, it had only two days of uncovered garbage. This was a considerable improvement over the mountains of uncovered garbage which had been present before the action

was instituted. The inspector did note evidence of stream pollution during that inspection.

In December, 1986, the Department of Natural Resources inspected the operation and found that the garbage was still not being covered and the discharge from the landfill was causing the stream to change colors.

On February 25, 1987, the West Virginia Department of Natural Resources entered into a consent order in Civil Action No. 86-C-3918. The consent order required the Fleming Landfill to take the various steps to correct problems with the landfill.

In May, June, and July, the Department of Natural Resources

inspected the Fleming Landfill. Although the problem with covering the garbage had been partly corrected, the covering still was not being done in accordance with the regulations. On each of these inspections, the inspector noted the presence of odors.

On August 18, 1987, the Department of Natural Resources moved for an order holding the Fleming Landfill in contempt. By order dated August 18, 1987, the Court held the Fleming Landfill in contempt for failure to comply with the Court's previous Order.

On December 24, 1987, the respondents initiated the present action in the Circuit Court of Kanawha County. They asked that the

operation of the landfill be enjoined both for violations of statute and because the landfill was a nuisance.

During the period between the filing of the suit and the trial (October-November, 1988), the Department of Natural Resources continued to note violations such as water pollution, odors, and inadequate cover. Through at least the time of the trial, the conditions at the landfill remained the same.

From 1982 until the present date, as far as the record is concerned, the respondents' landfill did not and does not hold a permit from the West Virginia Department of

Natural Resources for the disposal of solid waste.[4]

Even though it routinely discharges leachate water into the waters of West Virginia, the respondents' landfill has never held and presently does not hold the required water discharge permit to do this from the West Virginia Department of Natural Resources.

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[4]At one time, the respondents held a permit from the West Virginia Department of Health. The authority to operate under that permit was apparently revoked on April 21, 1982, and there is no indication that the permit was ever reinstated. Even if that permit was reinstated at some later date, there was never any permit issued by the West Virginia Department of Natural Resources. The West Virginia Department of Natural Resources assumed responsibility for the regulation of landfills from the West Virginia Department of Health in 1983.

Even though the Fleming Landfill has in the past taken hazardous waste, it has never in the past and presently does not hold the required permit from the Department of Natural Resources which would authorize it to take hazardous waste.

Even though the Fleming Landfill has in the past taken medical waste, it has never in the past and presently does not hold a permit which would authorize it to accept medical waste.

III. SUMMARY OF ARGUMENT

This Court has recently resolved the issues presented in this case. Pacific Mutual Life

Insurance Company v. Haslip, 59 U.S.L.W. 4157, March 4, 1991.

To the extent that the present case differs from the Haslip case the facts in the present case show the punitive damage award to have been more reasonable and the jury to have been provided more guidance in assessing those damages.

To the extent that other sanctions which the State of West Virginia is authorized to impose for conduct similar to that of the petitioners is relevant, the punitive damages imposed in this case are considerably less than the civil penalties which the State of West Virginia would be authorized to impose on the Fleming Landfill for its conduct.

IV. ARGUMENT

A. The punitive damages assessed in this case satisfy any test of constitutional reasonableness.

To the extent that the constitutional standard against which punitive damages are to be measured is one of reasonableness, the punitive damages imposed in this case would satisfy that test. Although what is considered to be reasonable would always be somewhat subjective, the punitive damages imposed in this case are certainly as reasonable as those which the United States Supreme Court has considered in recent years. In Pacific Mutual Life Insurance Company v. Haslip, supra, the Supreme Court considered an award of

punitive damages of $840,000 for a single incident as not being unreasonable as a constitutional matter. Although there is no bright line that circumscribes what is constitutionally acceptable, it seems unlikely that an imposition of punitive damages of $105,000 for a course of illegal conduct carried on over a several year period in defiance of orders from regulatory agencies would be considered unreasonable as a constitutional matter.

Even the issue which the petitioners seem most anxious to present--whether it is constitutionally acceptable to have an award of punitive damages when there is no award of compensatory

damages--is not squarely presented by the record in this case. Although the jury did not award any compensatory damages, it did find that the landfill was a nuisance. From this it is apparent that the jury believed that there was damage at large although the jury apparently also believed that the plaintiffs should not be compensated for that damage.

So far as the defendant is concerned, it does not matter who is the recipient of the sum which was imposed upon him as punishment. Since the purpose of punitive damages is punishment, it is irrelevant to the defendant whether the punitive damages go to the state or some private person. The

defendant's interest is in not being punished unreasonably, an interest which was satisfied here.

As the trial court pointed out in its opinion, this is entirely consistent with settled West Virginia law. West Virginia law recognizes that the purpose of punitive damages is punishment. With such a purpose, punitive damages may be assessed without an award of compensatory damages. Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982).

The jury was specifically instructed to consider, among other things, "the extent of harm inflicted." Although it is impossible to know the jury's thinking, it is reasonable to infer

from this record that the jury considered the actions of the Fleming Landfill, including the persistence of that landfill in that course of action in spite of repeated warnings by regulatory officials, to be so outrageous that punitive damages were appropriate even if the specific harm suffered by these plaintiffs did not merit monetary damages.

Although the term "reasonable" will always be somewhat subjective, by such objective standards as are available the punitive damages imposed in this case were reasonable. By comparison with civil and criminal penalties imposed by West Virginia law for similar conduct, the punitive damages

imposed in this case are certainly reasonable.

The conduct which is a nuisance in this case is also a violation of the West Virginia Solid Waste Management Act, W. Va. Code 20-5F-1 et seq. and the West Virginia Water Pollution Control Act. W. Va. Code 20-5A-1 et seq. In its opinion, the trial court noted the "ample evidence presented of defendant's failure to comply with State regulatory provisions." (Appendix p. 5).

Operation of the landfill without any authorization since 1982, as the defendant has been, would subject the petitioners to a

maximum civil penalty of $10,000 per day. W. Va. Code 20-5F-6.[5]

Even if the Fleming Landfill had the bare legal authority to operate, its conduct over the 10-year period preceding the trial in this action was replete with violations of the statutes and regulations governing the operation of landfills. These violations would expose the respondents to maximum civil penalties of $10,000 per violation.

In addition to violations of the West Virginia Solid Waste Management Act, the conduct of the Fleming Landfill is also in

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[5]Since the trial in this action, the maximum civil penalty has been increased to $25,000 per day. W. Va. Code 20-5F-6, as amended, 1989.

violation of the West Virginia Water Pollution Control Act, W. Va. Code 20-5A-1 et seq. The record is replete with references to discharges of polluted water into the waters of West Virginia. The inspector for the West Virginia Department of Natural Resources makes repeated references to discharge from the landfill causing the stream to change colors. Water samples taken by the Department of Natural Resources show high bacteria, iron, and phenols in water coming from the landfill. There can be little doubt that the Fleming Landfill had been repeatedly discharging polluted water to the Waters of West Virginia. Such conduct would subject the

petitioners to civil penalties of up to $10,000 per day of violation. W. Va. Code 20-5A-17. In addition violations might also subject the petitioners to criminal penalties and jail sentences. W. Va. Code 20-5A-19.

In short, had the petitioners' conduct been the subject of a civil or criminal enforcement action, the potential penalties would have been several times the punitive damages assessed in this case. To the extent that the West Virginia Legislature has spoken on this subject, this is an indication that the penalty imposed upon the petitioners in this case because of their conduct is reasonable.

B. The jury was given sufficient guidance to satisfy constitutional standards.

In the case of Pacific Mutual Life Insurance Company v. Haslip, supra, the Court considered both the general concept of guidance provided to juries in assessing punitive damages and the specific jury instructions used in that case. As a general manner, the Court held that the terms used in the jury instructions, while giving the jury significant discretion, gave no more discretion than such commonly used terms as "reasonable care," or "due diligence." 59 U.S.L.W. at 4162. The Court concluded that the use of such general terms was constitutionally acceptable.

Thus the general issue of whether it is constitutionally acceptable to give juries only the guidance of general instructions in helping them assess punitive damages has been recently decided by this Court. Furthermore, it has been decided by this Court in a manner which is contrary to the position advocated by the petitioners in this case. There is no reason for this Court to reconsider an issue which it has so recently ruled upon. This is especially true when, as here, addressing the issue would not change the outcome below.

The Court in Haslip also considered the constitutionally of the specific jury instructions used in that case. In Haslip, the jury

was instructed that punitive damages were not mandatory, that the purpose was to deter, and that the degree of wrongdoing was a relevant factor. 59 U.S.L.W. 4158. The Court determined that these instructions gave the jury sufficient guidance to survive a constitutional challenge.

In the present case, the jury instructions provided the jury with even more explicit guidance. In addition to instructing the jury on the purpose of punitive damages and giving general guidance, the Court also instructed the jury that it should "take into consideration all the circumstances surrounding the particular occurrence which is the subject of this litigation,

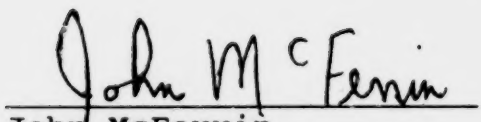
including the nature of the wrongdoing, the extent of harm inflicted, the intent of the party committing the act, the apparent wealth of the defendants, including in each case his or its assets and income as well as any mitigating circumstances."

Such instructions would certainly pass the test for constitutionality of the majority opinion. Even were they to be tested by the stricter standards which Justice O'Connor favors in her dissent, these jury instructions would in all probability pass constitutional muster.

V. CONCLUSION

For the reasons stated above, the respondents request that the petition for certiorari be refused.

JULIAN GARNES and
SHARON GARNES,
Plaintiffs-
Appellees,
Respondents.



John McFerrin
1116B Kanawha Boulevard, East
Charleston, WV 25301

COUNSEL FOR RESPONDENTS

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of January, 1991, the following order was made and entered:

Julian Garnes and Sharon Garnes, Plaintiffs Below, Appellees

vs.) No. 910088

Fleming Landfill, Inc., and John T. Fleming, Defendants Below, Appellants

Upon an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 2nd day of February, 1990.

On a former day, to-wit, January 7, 1991, came the petitioners, Fleming Landfill, Inc., and John T. Fleming, by Pauley, Curry, Sturgeon & Vanderford, Arden J. Curry, Arden J. Curry, II, and

David K. Schwirian, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 2nd day of February, 1990. Upon consideration whereof, the Court is of the opinion to and doth hereby refuse said petition on the merits.

A True Copy
Attest: _____
Clerk, Supreme Court of Appeals

January 8, 1990

John McFerrin, Esquire
116-B Kanawha Blvd., E.
Charleston, W.V. 25301

Benjamin N. Snyder, Esquire
P. O. Box 659
Clendenin, W.V. 25045

Arden J. Curry, Esquire
P. O. Box 2786
Charleston, W.V. 25330

Phillip B. Hereford, Esquire
405 Capitol Street
Charleston, W.Va. 25301

Re: Julian Garnes and
Sharon Garnes v. Fleming
Landfill, Inc. and John T.
Fleming 87-C-4527

Gentlemen:

A number of post trial motions were made by both parties during the months that followed the jury trial herein.

Defendant's motion to set aside the verdict of the jury is primarily based upon the contention that since the jury verdict awarded no compensatory damages to the plaintiff, this Court cannot accept the verdict awarding punitive damages. Indeed, it is defendant's position than an award of compensatory damages is prerequisite

to an award of punitive damages. At the very least defendants maintain that there must be punitive damages. It has been widely held that there is no cause of action for punitive damages alone. 22 Am Jur 2d, Damages, 241, 17 ALR2d 527. The bulk of these rulings simply imply that a jury must consider the cause of action independently of plaintiff's claim for exemplary damages. Some states have ruled that a jury must first award compensatory damages before any punitive damages. West Virginia was long regarded as such a jurisdiction. Toler v. Cossinelli, 129 WV 591, 41 S.E.2d 672 (1942). Recent West Virginia cases reflect a trend away from strict adherence to the "reasonable relation" rule. Wells v. Smith, W.V. 297, S.E.2d 872 (1982), Leach v. Biscayne Oil and Gas Co., W.Va. 289 S.E.2d 197 (1982).

> "...where the jury is properly instructed on the issue of damages, the failure to return an award for compensatory damages should not of itself preclude a punitive award, provided that there is evidence showing an injury to the plaintiff caused by the egregious and tortious conduct of the defendant." Wells v. Smith (Supra)

"Only where the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury should the award be set aside as excessive." Wells v. Smith (Supra)

This Court finds that there was ample evidence presented of defendant's failure to comply with State regulatory provisions, either willfully or through wreckless indifference. These regulations were intended to prevent harm such as was alleged in the plaintiff's complaint. Here the jury was properly instructed as to what they could properly consider, including the circumstances surrounding particular occurrences; the nature of the alleged wrongdoing; the extent of any harm; the intent of the alleged committing party; as well as the wealth of the alleged committing party. The jury was also properly instructed that annoyance and inconvenience was to be considered in regards to compensatory damages, if any. There being some admissible evidence covering these points, and the jury having been properly instructed on these matters, the verdict will not be set aside on grounds that no compensatory award was made.

The second major point raised by defendants in support of post

trial motions is that the jury award is excessive. Previous pronouncements of the West Virginia Supreme Court of Appeals relied heavily upon the "reasonable relation" rule. The thinking being that where punitive damage awards remain in proportion to "actual damages done" the possibility that an award might be based on partiality and prejudice is minimized. However, recent rulings of our Supreme Court reflect a trend away from strict adherence of such a rule on the grounds that it would "thwart the punishment purpose of punitive damages in cases where the defendant's conduct has been egregious, but where plaintiff has suffered intermediate or nominal damages. This discourages the plaintiff from bringing the suit and deprives the public from the deterrence of wanton acts." Wells v. Smith, (Supra). The jury considered some evidence of defendant's financial ability.

> "Courts must not set aside jury verdicts as excessive, unless they are monstrous, enormous, beyond all measure, unreasonable, outrageous and manifestly show jury passion, impartiality, prejudice or corruption." Muzelak v. King Chevrolet Inc., 368 S.E.2d (W.V. 1988); Roberts v. Stevens Clinic Hospital, 345 S.E.2d 791 (1986).

The post trial motions to set aside upon this ground is DENIED.

The final matter brought before the Court that requires ruling is the motion of plaintiff for a permanent injunction against the defendant, closing defendant's business, upon grounds that defendant is maintaining a nuisance, and upon all grounds for which plaintiff prayed for damages. The Court notes that damages were sought and an award was secured herein. This Court is also taking into consideration that a temporary injunction was denied by Judge Patrick Casey herein. For this equitable portion of the case the jury sat as an advisory jury and the lack of any compensatory damages is taken into consideration. There was no evidence that the defendant's landfill was situated within a populous municipality; but, to the contrary the evidence is that was constructed in a rural area, without zoning laws. It is the finding of this Court that the statutory laws and regulations do not render the landfill herein to be illegal, nor does any law of this State define it to be a nuisance per se. Furthermore, the verdict of the advisory jury leads this Court to conclude and find that the landfill is not a situation that will likely be a nuisance in the future, if left without Court intervention and not

shut down. The motion for permanent injunction is therefore denied for the greater part, except the defendant is enjoined from allowing mud and debris to accumulate and remain upon the public right of way providing ingress and egress from the landfill herein.

The remaining motions "NOV" and the grounds that they serve are hereby Overruled for the reasons previously expressed in the record in this case.

An order in conformity herewith, will be prepared by this Court incorporating this letter of memorandum of opinion.

Very truly yours,

Herman G. Canady, Jr.,
Judge

HGCJr./ny

April 21, 1982

Mr. John T. Fleming
561 Mundy Hollow Road
Charleston, West Virginia 25312

Dear Mr. Fleming:

You are hereby ordered to cease and desist receiving and depositing solid waste at your facility and to cover all exposed waste immediately upon receipt of this letter, violations and deficiencies supporting this order include:

1. You are constructing and operating a disposal facility without a permit.

2. Permit application was submitted subsequent to commencing construction and operation. An inspection on 19 April 1982 found the following:

a. Uncovered waste from previous day(s).

b. Cells not constructed as shown on application and waste not adequately compacted.

c. 4" diameter under drain in inadequate size.

d. 4" diameter under drain as

installed would not relieve ponding upstream to fill.

e. Operator was scraping irregularly located areas in either hillside, defeating run-off diversion and posing sedimentation problems.

f. Operator was not cutting cell bottom bench patterns in hillsides as shown on drawing.

g. Upstream storm water detention pond overflows into upper end of waste accumulation.

h. Waste was dumped to several feet deep around boles of trees to 14" or more diameter.

i. Leachate drainage system is uncertain.

j. No provision discernable for continuing leachate collection as fill progresses upstream.

k. Location of gas line not marked.

l. Springs on hillside are below diversion ditch.

m. Cutting in areas of springs is precipitating slides.

3. Leachate discoloration is traceable to and below confluence with main Mundy Hollow stream.

4. Old area is not adequately closed:

a. Waste is exposed on top surface and fill face as well as face of second pond impoundment.

b. Leachate is issuing from fill face. Leachate at south westerly end is bypassing first pond.

c. Runoff is not diverted. Lengthy diversion ditch to pond above filling operation discussed in Item 1 above has extremely limited capacity and will be difficult to maintain.

d. Both existing leachate ponds are septic.

e. Vegetation of all bare earth surface is needed.

You are further ordered to correct all violations at the old area within 30 days. Authorization to begin operating at the new location will not be given until the corrections noted under Item 2 above and the plans are satisfactory, and

assurance of ability to maintain compliance is submitted.

Sincerely,

Robert P. Wheeler, Director
Office of Environmental
Health Services

RPW/DP/mwg
cc: Charles Saber
Jim Kay
Karen Watson